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NO. 90-692

Supreme Court, U.S.
FILED
DEC 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VICTOR ROGERS and
LOREN SINGLETARY,
Petitioners,

v.

THE FEDERAL DEPOSIT INSURANCE CORP.,
As Receiver for
FIRST REPUBLICBANK HOUSTON, N.A.
and NCNB TEXAS NATIONAL BANK,
Respondents

PETITIONERS' REPLY TO RESPONDENT NCNB TEXAS NATIONAL BANK'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 11, 1990

QUESTION PRESENTED

Whether the federal common law *D'Oench, Duhme* doctrine shields the FDIC and the successor to a failed financial institution from federal securities law claims—particularly claims under § 29 of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc.

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Because the Brief in Opposition to Petitioners' Petition for Writ of Certiorari (the "Petition") filed by Respondent NCNB Texas National Bank ("NCNB") raises new issues which seriously misstate both fact and law, Petitioners Rogers and Singletary file this Reply to NCNB's Brief in Opposition ("Opposition") and respectfully show the Court the following:

NEW ISSUES RAISED IN NCNB'S BRIEF IN OPPOSITION MISREPRESENT BOTH FACT AND LAW.

1. Respondent NCNB Claims For The First Time And Without Any Legal Or Factual Foundation That The Common Law *In Pari Delicto* Defense Actually Governs This Case And Precludes Petitioners' Claims.

It is interesting to compare how Petitioner and Respondent each frame the issue presented by this case. The difference explains much of the need for this Reply. Respondents NCNB claims that there is no conflict in the Circuit Court over the question posed by this case and that this case was correctly decided by the Fifth Circuit Court of Appeals under settled law. Opposition at 14-16, 11-13. This Court can assess for itself the merits of Petitioners' claim and Respondent's denial that there is a conflict in the circuits regarding the preclusion of federal securities law claims by the federal common law *D'Oench, Duhme* doctrine. Petition at 15-20; Opposition at 14-16. However, NCNB introduces in its Brief the novel notion that the law governing this case is settled because the common law *in pari delicto* defense—a defense *never* pled in this *D'Oench, Duhme* case and never addressed in any pleading or brief in any evidence presented to any court, or in any opinion issued below—actually governs this case and was correctly applied by the Court of Appeals. Opposition at 13. According to NCNB, the Fifth Circuit (without ever saying so) was actually balancing the fault of Petitioners as victims of NCNB's fraud against the innocence of the FDIC when it rejected Petitioners' claims in a split decision on the basis of what it said was the *D'Oench, Duhme* doctrine. Opposition at 13-14. Aside from the interjection of a "governing" defense never raised in this case, Respondent seems to be arguing that the complex statutory scheme of federal securities law recognizes one common law de-

fense, *in pari delicto;* therefore, federal common law bars federal securities law claims—a logical non-sequitur.

In actuality, Respondent's claim that this case is really nothing but a correct application of the settled law of *in pari delicto* is but one of many examples of Respondent's attempts to sweep aside both Petitioners' actual claims and the actual holdings of the courts below and to recast all those claims and holding to Respondent's liking. Thus this Court's recognition of one (non-applicable) common law defense to federal securities claims becomes "settled law" holding that federal common law overrides federal securities law; the federal common law *D'Oench, Duhme* doctrine becomes the common law *in pari delicto* doctrine; *D'Oench, Duhme* defenses become, at Respondent's whim, federal statutory defenses under 12 U.S.C. § 1823(e) or the Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA"); the fraudulent sale of securities in violation of federal statute becomes common law fraudulent inducement; and so on. This blatant manipulation of actual issues to Respondent's taste is unauthorized in law, unjustified on the facts, and dangerous in application. It should be rejected out of hand by this Court in every guise in which Respondent has advanced it. Accordingly, since Respondent's claim that this case is controlled by settled law boils down to the claim that Petitioners' claims are precluded by the common law defense of *in pari delicto,* Respondent's argument that the case is controlled by settled law should be rejected.

2. Respondent NCNB Incorrectly Claims That The Decision Below Has Been Moved By A Subsequent Congressional Act.

Respondent NCNB claims that the decision below has been mooted by FIRREA's extension of the provisions of § 1823(e) to cases like this one in which the FDIC is present as receiver. Opposition at 17-18. The claim that FIRREA extends § 1823(e) to the FDIC as receiver is true and undisputed, although § 1823(e) has not been pled by Respondents in this case. The further claim that FIRREA moots *D'Oench, Duhme* is false. The *D'Oench Duhme* doctrine has never been held to have been precluded by § 1823(e), either in its pre-FIRREA guise or in its post-FIRREA guise. To the contrary, the federal courts, including this Court, have uniformly held or assummed that the *D'Oench, Duhme* doctrine and § 1823(e) are complimentary defenses and have applied them jointly or singly as appropriate. *See FDIC v. McClanahan,* 795 F.2d 512, 514, n.1 (5th Cir. 1986) (§ 1823(e) does not preempt the common law rule of *D'Oench, Duhme*); see *also Langley v. FDIC,* 484 U.S. 86 (1987) and *Gunter v. Hutchinson,* 674 F.2d 862 (11th Cir.), *cert. denied,* 459 U.S. 826 (1982). Moreover, Respondent's further claim that, "In the future there will be no question that federal securities fraud claims and defenses will be barred" by § 1823(e) and by 12 U.S.C. § 1821(a)(4)(I) (which extends the provisions of § 1823(e) to bridge banks like NCNB) is without legal support. *See* Opposition at 17-18. This Court has never held that § 1823(e)—either pre- or post-FIRREA law—or § 1821 shields the FDIC or any successor to a failed financial institution from federal securities law claims. Therefore that important question remains to be answered, and Respondents' preemptory claim that "there will be no question that federal securities fraud claims and defenses will be barred" is nothing more than a naked assertion unsupported by law and provides no ground for denying certiorari.

3. Respondent NCNB Incorrectly Claims That This Case Is Procedurally Defective.

Respondent NCNB makes much of a supposed procedural defect in the posture of this case, allegedly deriving from Petitioners' failure to prove fraud at the summary judgment level. Opposition at 2-6, 18-19. Respondent NCNB raised the same claim for the first time on appeal in the Fifth Circuit, where it was fully briefed and was rejected by the Circuit Court. *See* Pet. App. at 10a. Nor could Respondent have prevailed on its claim. Respondents NCNB and FDIC rested their entire motion for summary judgment on the *legal* claim that the federal common law *D'Oench, Duhme* doctrine precludes fraud, including federal securities fraud, as a defense to collection of notes executed in favor of a failed bank. On their own theory of the case, proof of fraud in such cases is *immaterial* and cannot prevent the rendition of summary judgment in favor of the FDIC and the successors to a failed institution under *D'Oench, Duhme*. Respondent NCNB admitted as much in its Brief in Support of Motion for Summary Judgment at 18, stating, "fraud, federal securities, states securities, waiver and estoppel claims are all immaterial to recovery by NCNB." Had fraud, in fact, been material to Respondent's Motion for Summary Judgment, *Respondent* not Petitioners would have had the burden of proving the *non-existence* of fraud before the burden shifted to Petitioners to prove its existence. *Adicks v. S.H. Kress & Co.*, 398 U.S. 144, 159-160, 90 S. Ct. 1598, 1609 (1970). Where the movant for summary judgment does not meet its initial burden of establishing the absence of material fact, the non-movant is not required to come forward with suitable opposing affidavits. *Adicks*, 398 U.S. at 160, 90 S. Ct. at 1610. In fact, Respondents did not challenge Petitioners' statement of the

facts, and, therefore, the court was required to interpret those facts in the light most favorable to Petitioners. *See* 398 U.S. at 158-159, 91 S. Ct. at 1609. The Court of Appeals correctly recognized and applied this rule. *See* Pet. App. at 10a. Respondent NCNB's argument that certiorari should be denied because of procedural defects in this case is a red herring, previously rejected by the Fifth Circuit, and should be similarly rejected by this Court.

Respondent NCNB goes far beyond claiming a procedural defect on Petitioners' part, however. Respodent claims that since Petitioners did not prove fraud in the district court their fraud claims are non-existent for the purposes of certiorari. Indeed it claims, "There is no evidence of a security, no evidence of fraud, no evidence of reliance by any Plaintiff." Opposition at 19. In fact, not only were the facts as stated by Petitioners necessarily taken as true by the district court, but Respondents themselves *admitted* many of Petitioners' factual claims in their First Amended Original Answer ("Answer"), including Petitioners' claims that they signed notes for stock purchases of Texas National Bank-Post Oak ("TNB-Post Oak") and Texas National Bank-Wstheimer ("TNB-Westheimer") with First RepublicBank Houston, N.A. ("RepublicBank"), the predecessor to NCNB; that RepublicBank financed the capitalization of TNB-Westheimer through a master note; and that directors of TNB-Westheimer and TNB-Post Oak brought suit against RepublicBank and others for fraud in the sale of the stock of TNB-Westheimer and TNB-Post Oak. Answer at 5. That Answer was, of course, part of the record for summary judgment purposes. Nor does Respondent stop with declaring the non-existence of fraud in this suit. It even

goes so far as to claim, "Petitioners' claims against the FDIC are *not* based on the sale of securities, because [First RepublicBank Houston] did not sell any of the stock in Texas National Banks, and Petitioners do not allege that it did." Opposition at 18. Not only is this new version of the facts belied by Respondents' own Answer, as shown above, but, in fact, Petitioners from the beginning of this case alleged that First RepublicBank was a seller of the securities Petitioners purchased in TNB-Westheimer and TNB-Post Oak, stating clearly in their First Amended Original Complaint,

> RepublicBank and Riddle engaged in the fraudulent sale of securities to Plaintiffs financed by loans from RepublicBank secured by bank stock. Therefore, RepublicBank and Riddle made each such sale to Plaintiffs under contracts made in violation of section 29.

Plaintiffs' First Amended Original Complaint at 32-33.

Having thus written off Petitioners' factual and legal securities fraud claims, Respondent proceeds to rewrite the facts it had formerly accepted, offering to this Court a version of the facts which it has never before presented in any pleading or in oral argument below. Opposition at 5-6. *This* attempt to sandbag Petitioners with a new version of the facts is the real procedural defect. Nevertheless, Respondents' rewriting of the facts and issues in this case—however improper—should not be allowed to obscure the real issue before this Court—which is the importance of granting certiorari to determine whether the Fifth Circuit Court of Appeals—in conflict with the Fourth, Sixth, Eighth, and Eleventh Circuit Courts of Appeals—was correct in holding that the federal common law *D'Oench, Duhme* doctrine shields the FDIC and the

successors to failed financial institutions from federal securities law claims.

CONCLUSION

For the foregoing reasons, Respondent NCNB's arguments against granting certiorari are without merit and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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